No. ------

IN THE

SUPREME COURT OF THE UNITED STATES

SEARS, ROEBUCK AND CO.,
A New York corporation,
Petitioner,

v.

RICHARD F. GUGEL, SR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

(NOTE: References in this section, unless otherwise indicated, are to the original Appendix).

It is an elementary principle that upon a Motion to Dismiss a cause of action, the facts of a case should be viewed in the light most favorable to the plaintiff. These facts in this case are as follows:

Plaintiff is a fifty-five year old man who was injured when he was caused to fall into an open, unguarded grease pit in defendant's service garage.

On January 24, 1959, about 1:30 in the afternoon, the plaintiff went to the defendant's store in downtown Saginaw, Michigan, to purchase a television set (69a, 70a). The day was stormy, snowy and blizzardy (24a, 70a). The plaintiff had parked his car on Janes Street in back of defendant's store, and when he returned to his car, after purchasing the television set, he found that he was unable to start his car, because the battery was dead (70a, 71a).

Plaintiff returned to defendant's store, with the intention of calling a wrecker, but while he was in the store, he decided to see if he could get someone in defendant's service garage, which was attached to defendant's store, to start his car for him (71a).

The defendant owned and operated a service garage in connection with its retail store, inside of which they greased and lubricated cars, made automobile repairs, etc. (6a, 11a).

Located inside of defendant's service garage at the time were four (4) open grease pits, each 15 feet 11 inches long, and 42 inches wide (19a). Around the edge of each pit was a one-quarter inch steel rim, which extended four inches above the surface of the floor (32a, 54a).

The defendant, prior to the day of the accident, had used waist high (36a) guarding chains fastened to steel poles around the edges of these open pits, but for some unexplained reason, they were not present on the day that plaintiff visited the service garage (36a-38a; 102a-104a).

Prior to January 24, 1959, plaintiff had visited the premises of the service garage only three times in three years (68a-69a), but had never been in the area of the grease pits before that day (69a).

At the time plaintiff entered, cars covered all four of the pits (73a).

The light inside the service garage was *dim* and things on the floor were camouflaged (74a, 80a).

Plaintiff had to wait several minutes before one of the service garage attendants could help him. During this time, he stood between the cars which were over Pits No. 1 and No. 2, and he visited briefly with a man whose car was being serviced (72a, 73a, 79a). When the attendant finished servicing the car over Pit No. 1, he asked the plaintiff to follow him so he could attend to his car, which plaintiff proceeded to do (41a, 59a, 73a, 74a).

It was agreed by virtually all the witnesses that the service garage floor, around the pits, was covered with water and slush and snow (38a, 39a, 46a, 80a-81a). The distance between pits No. 1 and No. 3 was about 4 feet, but an automobile on pit No. 3 narrowed the walking distance between the pits to about 3 feet (64a).

As plaintiff was following the attendant around the southeast corner of pit No. 1 (see Plaintiff's Exhibit No.

1, 114a), plaintiff stubbed his toe on the edge of the four inch raised rim around the outside edge of the pit and fell down into the open pit, severely injuring his back (86a, 92a).

The jury found in plaintiff's favor and awarded him the sum of $7,850.00.

After the trial Court denied defendant's Motion for Judgment Notwithstanding the Verdict and/or a New Trial, defendant took an appeal to the United States Court of Appeals for the Sixth Circuit, claiming (1) that defendant had not been guilty of any negligence, and (2) that plaintiff was guilty of contributory negligence as a matter of law.

The Court of Appeals in a two-one decision affirmed the District Court, holding that the issues of negligence and contributory negligence were properly left to jury determination (see *Gugel vs. Sears, Roebuck & Co.*, 308 F. 2d 131).

The defendant then filed a Petition for a Rehearing in the Court of Appeals, which Petition was denied on November 2, 1962.

Defendant now has filed a Petition for a Writ of Certiorari in this Court.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT

(NOTE: References in this section are to the Appendix accompanying the Petition for Writ of Certiorari).

The complaint made by the Petitioner in this case is that the Court of Appeals for the Sixth Circuit failed to follow the law of the State of Michigan and ignored its own prior decisions in deciding that in this personal injury case the issues of negligence and contributory negligence were properly left for jury determination.

It is extremely difficult to understand how anyone could read recent decisions of the Supreme Court of Michigan and come to the conclusion that the District Judge and the Court of Appeals are all wrong and that the Petitioner is correct.

In Michigan it has been clearly pronounced law in recent years that the issues of defendant's negligence and of plaintiff's contributory negligence in a personal injury case *shall be left to the jury for determination.* The majority opinion of the Court of Appeals points this out quite clearly in its Opinion (14a-15a), citing cases from 1957 to date.

The respondent sees little point in reviewing all of the decisions cited. The principle running through all of these cases is clear and that is this:

> "If there is a doubt as to whether *all reasonable men* would draw the same conclusion from the evidence, then the question must be submitted to the twelve reasonable men appointed by the Constitution to determine disputed or doubtful questions of fact."
>
> (*Normand vs. Thomas Theatre Corp.*, 349 Mich. 50, 84 N.W. 2d 451 (1957)).

The Petitioner here (defendant in the lower Court) relied on four Michigan cases of early vintage — none of them since 1941. The Court of Appeals referring to those cases stated that while it *might be argued* that under those early decisions the plaintiff *might* be held to be guilty of negligence as a matter of law, the Supreme Court of Michigan had in recent years held that *any doubtful case should be submitted to the triers of the facts* (13a-14a).

Actually, the more recent Michigan cases relied upon by the District Court and the Court of Appeals only reiterated what was already said by the Supreme Court of Michigan in 1890 in the case of *Engel vs. Smith*, 82 Mich. 1, 46 N.W. 21, which, incidentally, is similar to the instant case, insofar as the facts are concerned.

In the *Engel* case, plaintiff brought suit to recover for injuries sustained when he fell through a trap door in the floor of defendant's store.

According to the report at page 5:

> "The negligence charged is that the defendants *failed to properly guard the hatchway while it was open*, or to warn the plaintiff of the danger."

Plaintiff had a verdict and defendant appealed, contending that the maintenance of the trap door was not negligence and that even if it was, plaintiff was guilty of contributory negligence as a matter of law, since he was well aware of the opening, yet nevertheless fell into it.

With regard to the negligence, the Court said at page 5:

> "Trap doors, elevator shafts and *similar openings in* floors have long been a usual and necessary part of the appliances of business in most warehouses, manufactories and other business buildings * * * *but they are dangerous openings* * * * The fact of their dangerous character *makes it the duty of those maintaining them to properly guard them when they are open.*"

On the question of plaintiff's contributory negligence, the Court said this at pages 6 and 7:

> "The question of plaintiff's contributory negligence is one of more difficulty. He knew as much about the location of the trap door as did the defendants. He knew that it was customary for defendants to use it at that time of day. * * * He did not think, upon opening the door, to stop and examine to see whether the trap door was open before stepping in. Any thought on his part at the moment would have prevented the accident, and the question is a very close one as to whether the duty on his part of taking care was as great under the circumstances as was the duty of the defendants. * * * As we have said, the question is one of some difficulty and is not free from doubt. *We have held that in such cases the facts should be submitted to the jury.*"

Defendant in the instant case claimed that the plaintiff was negligent as a matter of law, since the pits were open and obvious and plaintiff knew that they were there.

The *Engel* case is ample authority for the proposition that *knowledge of an open hole in the floor will not necessarily preclude recovery.*

The majority opinion of the Court of Appeals agreed that the *Engel vs. Smith* case was in point, as were other

Michigan cases and cases from jurisdictions such as California, Massachusetts, and Florida.

The Petitioner claims, quite wrongly, on page 8 of his Brief in support of his Petition that the *Budman vs. Skore* case, 363 Mich. 458, 109 N.W. 2d 791 (1961) is distinguishable since it was a case in which plaintiff fell "because of unknown and unseen hazards." On the contrary, in the *Budman* case, plaintiff sued for injuries as the result of slipping on a greasy puddle of water in defendant's store. Plaintiff had been a patron of defendant's store for about 1½ years before the date of the accident. On the day in question, she parked behind defendant's store and used the rear entrance which she had done on other occasions previously. The door led into a storage room. According to the report, when plaintiff came into the back door:

> "*She noticed a puddle of water on the floor.* • • • She stepped through the puddle and *noticed that it was greasy underneath.*"

On her return trip she again "stepped into the puddle" of greasy water and slipped, injuring her ankle. There was a directed verdict for the defendant. Upon appeal the lower Court was reversed and the case was remanded back for a new trial. Mr. Justice Kelly who wrote the unanimous Opinion of the Michigan Supreme Court said on page 462 of the report as follows:

> "We have repeatedly held that on a motion for directed verdict the evidence must be viewed in the light most favorable to the party opposing the motion and that *to justify the taking of a case from the jury, the evidence must be such as to preclude any reasonable view establishing plaintiff's claim for the right to recover.*"

IT IS PLAIN, THEN, THAT THE COURT OF APPEALS DID NOT IGNORE MICHIGAN PRECEDENT IN DECIDING THIS CASE. THE COURT METICULOUSLY FOLLOWED THE UNMISTAKABLY CLEAR PRONOUNCEMENTS OF THE SUPREME COURT OF MICHIGAN ON THE QUESTIONS OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

As to the charge that the Court of Appeals ignored its own previous Decisions, this is equally without merit. The Petitioner in his Brief has cited no Sixth Circuit case, or indeed, any other Federal Court case, which is contrary to the majority ruling in this case.

The Court of Appeals on the other hand cited Fourth Circuit and Fifth Circuit Opinions in support of its conclusions (15a), and further quoted from an Opinion of the United States Supreme Court on this same question. The case was that of *Grand Trunk Railway Co. vs. Ives*, 144 U. S. 408, where it was said at page 417:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, *the determination of the matter is for the jury.*"

The chief argument made by the Petitioner (defendant in the lower Court) was that plaintiff had been guilty of contributory negligence as a matter of law. In taking this position, the defendant would have us believe that contributory negligence is the slightest departure from perfection. To put it another way, the defendant argues that if plaintiff is negligent one-half of one per cent, and he is ninety-nine and one-half per cent perfect, he is, nevertheless, negligent and is himself responsible for the accident as a matter of law. That, of course, is not true.

Contributory negligence is a departure from the conduct of the ordinarily prudent person, and the ordinarily prudent person is a C-grade (average) individual. He is the 75% intelligence man and such people have a right to a number of frailties of life, a number of losses of memory, and a number of errancies and misconceptions. *The ordinarily prudent person is not a perfect person. Contributory negligence then is a departure from what is normal, not a departure from perfection.*

It was well said in *Kilpatrick vs. Grand Trunk Railway Co.*, 52 A. 531 (Vt.-1902):

> "The law required of him (plaintiff) the prudence of a prudent man, and such a man is not one who never forgets anything, is never guilty of any inat-

tention, and never fails to think of any possible danger to which he is exposed since this would require the perfect or infallible man. * * *"

CONCLUSION

Plaintiff below charged that the defendant was negligent in failing to adequately light the garage. The Court of Appeals held that this was a question of fact for jury determination, citing a number of Michigan cases and cases from other jurisdictions (9a-10a). Likewise, the Court said it was for the jury to decide whether or not defendant should have had a guardrail, chain or other protective device around the grease pit as they had at one time (11a-12a).

On the issue of contributory negligence, the Court of Appeals adhered to the latest pronouncements of the Supreme Court of Michigan to the effect that such an issue should be likewise determined by the jury (14a-16a).

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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